REMARKS/ARGUMENTS

Claims 1-35 are pending in this application with Claims 1 and 18 being in independent form. Claims 1, 2, and 18 are currently amended. Claim 20 has been canceled.

Claim Rejections – 35 U.S.C. §112

The Patent Office rejected Claims 18-35 under 35 U.S.C. § 112, first paragraph, as being unpatentable for lack of enablement. The applicant respectfully traverses the rejection. However, Claim 18 has been amended, which Claims 19-35 depend from, so Claims 18-35 are believed to be enabled and allowable because "a grilling element" is not listed in the claims anymore.

Claim Rejections – 35 U.S.C. § 103(a)

The Patent Office rejected Claims 1-8, 10, 11, 14, 18-26, 28, 29, and 32 under 35 U.S.C. § 103 (a) as being unpatentable over Morgan et al. (U.S. Patent No. 6,632,468) (Morgan).

The Patent Office rejected Claims 9, 16, 17, 27, 34 and 35 under 35 U.S.C. § 103 (a) as being unpatentable over Morgan in view of Linford et al. (U.S. Patent Application Publication No. 2001/0043974) (Linford).

The Patent Office rejected Claims 12, 13, 15, 30, 31, and 33 under 35 U.S.C. § 103 (a) as being unpatentable over Morgan in view of Benson et al. (U.S. Patent 4,297,942) (Benson).

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations." (emphasis added) (MPEP § 2143). "If an independent claim is non-obvious under 35 U.S.C. 103, then any claim depending

therefrom is non-obvious." (emphasis added) *In re Fine*, 837 F. 2d 1071, 5USPQ2d 1596 (Fed. Cir. 1988).

Applicant submits that Independent Claim 1 recites elements which have not been disclosed, taught or suggested by Morgan. Independent Claim 1 recites as follows: "wherein said mixture is suitable for releasing steam together with said one or more additives onto the food item when said mixture is heated in the microwave oven." The technical material cited by the Patent Office does not recite the text of Independent Claim 1.

With respect to Independent Claim 1, the Patent Office has stated:

> With regard to claim 1, Morgan et al disclose a composite food comprising a gelatinous base, one or more additives, including flavoring agents (abstract, col 2 line 48), heating the food product in a microwave oven (col 6 lines 29-30). It is inherent that the product releases steam because a gelatinous product comprises water as a component, which releases steam upon being heated.

(1st Office Action, Page 4, Para. 10). The Patent Office further states:

> Additionally, the product in Morgan et al includes 15-80% water (col. 4, lines 7-8). Although Morgan et al does not specifically disclose that the food product releases steam when heated in the microwave oven, it would have obvious to the skilled artisan that such steam release would result since microwave heating occurs at a temperature higher than the boiling point of water. Nevertheless, the last two lines of claim 1 and the limitation in claims 2 and 20 are method limitations entitled to no patentable weight in applicant's product claims.

(Final Office Action, Page 2-3, Para 4). The Patent Office also recites that "Even if the gelatin in Morgan et al does [not] produce steam, as applicant contends, the water in the product of Morgan et al certainly will cause steam to be released upon heating thereof in the microwave oven." (Final Office Action Page 3, Para. 7). Applicant respectfully disagrees and traverses the rejection.

Applicant respectfully points out that Applicant has read the portions of Morgan identified by the Patent Office, and so far as Applicant can discern, Morgan does not recite the text of Applicant's Independent Claim 1. Rather, the portions of Morgan cited by Examiner recite as follows:

> Composite food having a gelling agent, selected from gelatin, egg white, modified waxy maize starch, whey protein concentrate, modified potato starch, gellan gum, and rennet casein, and a flavoring and/or texturing component, uniformly distributed throughout, selected from nonfat dry milk, butter, enzyme modified cheese, BBQ seasoning blend, cheddar cheese, sugars, milk protein concentrate, vinegar, and partially hydrogenated soybean oil, with the remainder of the composite made up primarily of water. The composite food product is substantially solid and self-sustaining at ambient temperature. Also, method for preparing a flavored and/or textured food item for service by providing a servable portion of an optionally cooked food item, removing a servable portion of the self-sustainable food product from the food product, contacting the servable food portion with the servable food item portion to form a flavored and/or textured food item combination, normally arranged with the product on top of the food item, and optionally (d) heating the flavored and/or textured food item combination to prepare the food item for service. . .
>
> . . . at least one flavoring component selected from the group consisting of . . .
>
> . . . arranged with the product on top of the food item, and (d) heating, for instance in a microwave oven . . .

(Morgan, Abstract; Col. 2, line 48; and Col. 6, lines 29-30).

As can be seen from the foregoing, Morgan does *not recite* the text of Independent Claim 1. For instance, Claim 1 recites "wherein said mixture is suitable for releasing steam together with said one or more additives onto the food item when said mixture is heated in the microwave oven." Nowhere in Morgan is there a recitation of this text.

Applicant has read Morgan in its entirety and is unable to locate a recitation of "wherein said mixture is suitable for releasing steam together with said one or more additives onto the food item when said mixture is heated in the microwave oven," as recited in Claim 1. (*Emphasis added*) Furthermore, even if the Patent Office's assertions that:

> [(1)] Additionally, the product in Morgan et al includes 15-80% water (col. 4, lines 7-8). Although Morgan et al does not specifically disclose that the food product releases steam when heated in the microwave oven, it would have obvious to the skilled artisan that such steam release would result since microwave heating occurs at a temperature higher than the boiling point of water;

and (2) "the water in the product of Morgan et al certainly will cause steam to be released upon heating thereof in the microwave oven" is held to be true, these assertions do not recite or make obvious the text "wherein said mixture is suitable for releasing steam together with said one or more additives onto the food item when said mixture is heated in the microwave oven," as recited in Claim 1. (*Emphasis added*).

Applicant further respectfully points out that the Patent Office has provided no evidence or reason as to why the text of the reference passage or the Patent Office's assertions should be interpreted to teach "wherein said mixture is suitable for releasing steam together with said one or more additives onto the food item when said mixture is heated in the microwave oven," recited in Independent Claim 1 as the Patent Office alleges. (*Emphasis added*).

The Patent Office also states that "Nevertheless, the last two lines of claim 1 and the limitation in claims 2 and 20 are method limitations entitled to no patentable weight in applicant's product claims." However, Claims 1 and 2 have been amended to remove the method limitations. Therefore, these lines should be read and given patentable weight.

Further, Applicant is required to seasonably challenge statements made by the Patent Office that are not supported on the record, and failure to do so will be construed as an admission by Applicant that the statement is true. M.P.E.P. §2144.03. Therefore, in accordance with Applicant's duty to seasonably challenge such unsupported statements, the Patent Office is hereby requested to cite a reference supporting the position that:

> [(1)] Additionally, the product in Morgan et al includes 15-80% water (col. 4, lines 7-8). Although Morgan et al does not specifically disclose that the food product releases steam when heated in the microwave oven, it would have obvious to the skilled artisan that such steam release would result since microwave heating occurs at a temperature higher than the boiling point of water; and

and (2) "Even if the gelatin in Morgan et al does [not] produce steam, as applicant contends, the water in the product of Morgan et al certainly will cause steam to be released upon heating thereof in the microwave oven," would have been obvious in accordance with the claimed invention. If the Patent Office is unable to provide such a reference, and is relying on facts based on personal knowledge, Applicant hereby

requests that such facts be set forth in an affidavit from the Examiner under 37 C.F.R. 1.104(d)(2). Absent substantiation by the Patent Office, it is respectfully requested that the rejection under 35 U.S.C. § 103 be withdrawn.

Based on the rationale above, Applicant contends that none of the references cited by the Patent Office against the present invention, either alone or in combination, disclose the above-referenced elements as claimed in Claims 1 of the present application and therefore, the above-cited references do not preclude patentability of the present invention under 35 U.S.C. § 103(a). Applicant further contends that it would not have been obvious to one of ordinary skill in the art at the time of the present invention to combine or modify any of the above-cited references, either alone or in combination, to arrive at the present invention as claimed. As a result, a *prima facie* case of obviousness has not been established for Independent Claim 1. Thus, Independent Claim 1 is believed allowable. Further, Claims 2-17 (which depends from Claim 1) are therefore allowable.

Applicant submits that Independent Claim 18 recites elements which have not been disclosed, taught or suggested by Morgan. Independent Claim 18 recites as follows: "wherein said gelatinous ingredient is suitable for releasing steam together with said one or more additives onto the food item when said gelatinous ingredient is heated in the microwave oven." The technical material cited by the Patent Office does not recite the text of Independent Claim 1.

With respect to Independent Claim 18, the Patent Office has stated "With regard to Claim 18, Morgan et al disclose a food product heated in a microwave oven comprising a gelatinous base and one or more additives (col 6 lines 29-30, abstract, col 2 line 48). (1st Office Action, Page 5, Para. 17). The Patent Office further states:

> Additionally, the product in Morgan et al includes 15-80% water (col. 4, lines 7-8). Although Morgan et al does not specifically disclose that the food product releases steam when heated in the microwave oven, it would have obvious to the skilled artisan that such steam release would result since microwave heating occurs at a temperature higher than the boiling point of water. Nevertheless, the last two lines of claim 1 and the limitation in claims 2 and 20 are method limitations entitled to no patentable weight in applicant's product claims.

(Final Office Action, Page 2-3, Para 4). Additionally, the Patent Office recites that "Even if the gelatin in Morgan et al does [not] produce steam, as applicant contends, the water in the product of Morgan et al certainly will cause steam to be released upon heating thereof in the microwave oven." (Final Office Action Page 3, Para. 7). Applicant respectfully disagrees and traverses the rejection.

Applicant respectfully points out that Applicant has read the portions of Morgan identified by the Patent Office, and so far as Applicant can discern, Morgan does not recite the text of Applicant's Independent Claim 18. Rather, the portions of Morgan cited by Examiner recite as follows:

> Composite food having a gelling agent, selected from gelatin, egg white, modified waxy maize starch, whey protein concentrate, modified potato starch, gellan gum, and rennet casein, and a flavoring and/or texturing component, uniformly distributed throughout, selected from nonfat dry milk, butter, enzyme modified cheese, BBQ seasoning blend, cheddar cheese, sugars, milk protein concentrate, vinegar, and partially hydrogenated soybean oil, with the remainder of the composite made up primarily of water. The composite food product is substantially solid and self-sustaining at ambient temperature. Also, method for preparing a flavored and/or textured food item for service by providing a servable portion of an optionally cooked food item, removing a servable portion of the self-sustainable food product from the food product, contacting the servable food portion with the servable food item portion to form a flavored and/or textured food item combination, normally arranged with the product on top of the food item, and optionally (d) heating the flavored and/or textured food item combination to prepare the food item for service. . .
>
> . . . at least one flavoring component selected from the group consisting of . . .
>
> . . . arranged with the product on top of the food item, and (d) heating, for instance in a microwave oven . . ."

(Morgan, Abstract; Col. 2, line 48; and Col. 6, lines 29-30).

As can be seen from the foregoing, Morgan does *not recite* the text Independent Claim 18. For instance, Claim 18 recites "wherein said gelatinous ingredient is suitable for releasing steam together with said one or more additives onto the food item when said gelatinous ingredient is heated in the microwave oven." Nowhere in Morgan is there a recitation of this text.

Applicant has read Morgan in its entirety and is unable to locate a recitation of " wherein said gelatinous ingredient is suitable for releasing steam together with said one or more additives onto the food item when said gelatinous ingredient is heated in the microwave oven," as recited in Claim 18. (*Emphasis added*) Furthermore, even if the Patent Office's assertions that:

> [(1)]Additionally, the product in Morgan et al includes 15-80% water (col. 4, lines 7-8). Although Morgan et al does not specifically disclose that the food product releases steam when heated in the microwave oven, it would have obvious to the skilled artisan that such steam release would result since microwave heating occurs at a temperature higher than the boiling point of water;

and (2) "the water in the product of Morgan et al certainly will cause steam to be released upon heating thereof in the microwave oven" is held to be true, these assertions do not recite or make obvious the text "wherein said gelatinous ingredient is suitable for releasing steam together with said one or more additives onto the food item when said gelatinous ingredient is heated in the microwave oven. (*Emphasis added*)

Applicant further respectfully points out that the Patent Office has provided no evidence or reason as to why the text of the reference passage or the Patent Office's assertions should be interpreted to teach "wherein said gelatinous ingredient is suitable for releasing steam together with said one or more additives onto the food item when said gelatinous ingredient is heated in the microwave oven," recited in Independent Claim 18 as the Patent Office alleges. (*Emphasis added*).

The Patent Office also states that "Nevertheless, the last two lines of claim 1 and the limitation in claims 2 and 20 are method limitations entitled to no patentable weight in applicant's product claims." However, Claims 1 and 2 have been amended to remove the method limitations. Therefore, these lines should be read and given patentable weight.

Further, Applicant is required to seasonably challenge statements by the Patent Office that are not supported on the record, and failure to do so will be construed as an admission by Applicant that the statement is true. M.P.E.P. §2144.03. Therefore, in accordance with Applicant's duty to seasonably challenge such unsupported statements, the Patent Office is hereby requested to cite a reference supporting the position that:

> [(1)]Additionally, the product in Morgan et al includes 15-80% water (col. 4, lines 7-8). Although Morgan et al does not specifically disclose that the food product releases steam when heated in the microwave oven, it would have obvious to the skilled artisan that such steam release would result since microwave heating occurs at a temperature higher than the boiling point of water;

and (2) "Even if the gelatin in Morgan et al does [not] produce steam, as applicant contends, the water in the product of Morgan et al certainly will cause steam to be released upon heating thereof in the microwave oven," would have been obvious in accordance with the claimed invention. If the Patent Office is unable to provide such a reference, and is relying on facts based on personal knowledge, Applicant hereby requests that such facts be set forth in an affidavit from the Examiner under 37 C.F.R. 1.104(d)(2). Absent substantiation by the Patent Office, it is respectfully requested that the rejection under 35 U.S.C. § 103 be withdrawn.

Based on the rationale above, Applicant contends that none of the references cited by the Patent Office against the present invention, either alone or in combination, disclose the above-referenced elements as claimed in Claims 18 of the present application and therefore, the above-cited references do not preclude patentability of the present invention under 35 U.S.C. § 103(a). Applicant further contends that it would not have been obvious to one of ordinary skill in the art at the time of the present invention to combine or modify any of the above-cited references, either alone or in combination, to arrive at the present invention as claimed. As a result, a *prima facie* case of obviousness has not been established for Independent Claim 18. Thus, Independent Claim 18 is believed allowable. Further, Claims 19-35 (which depends from Claim 1) are therefore allowable.

Furthermore, the Applicant respectfully traverses all the arguments made in the Office Action that were not specifically addressed above.

CONCLUSION

In light of the forgoing amendments and arguments, reconsideration of the claims is hereby requested, and a Notice of Allowance is earnestly solicited.

Respectfully submitted,

ConAgra Foods,

Dated: October 31, 2007

By: 

Marianne R. Timm
Reg. No. 58,850

Marianne R. Timm
SUITER · SWANTZ PC LLO
14301 FNB Parkway, Suite 220
Omaha, NE 68154
(402) 496-0300 telephone
(402) 496-0333 facsimile